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# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

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| THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY, Plaintiff-in-Error, AGAINST THE UNITED STATES, Defendant-in-Error. | No. 57. |

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF FOR THE UNITED STATES.

### Statement.

This case comes up on a writ of error, after conviction of the plaintiff-in-error, and its Assistant Traffic Manager, Fred L. Pomeroy, upon an indictment charging them with the payment of six rebates to The American Sugar Refining Company, and certain others, upon shipments of sugar from New York City to Detroit, Michigan.

### The Indictment.

The indictment was filed on May 4, 1906. It contained seven counts and charged as defendants, The New York Central and Hudson River Rail Road Com-

pany, its General Traffic Manager, Nathan Guilford, and its Assistant Traffic Manager, Fred L. Pomeroy. When the case came to trial, as to Guilford the indictment was severed by reason of his illness.

The first count of the indictment which charged the defendants with the offense of *offering* a rebate on April 26, 1904, was withdrawn by the District Attorney from the jury. Each of the remaining counts is in substantially the same form. Each charges the defendants with the payment of a separate rebate, each payment being made upon a different date and with respect to different shipments made during different months.

Thus the second count after setting out the various formal averments showing the establishment of the interstate through line in question from New York to Detroit and the establishment, filing and publication of the lawful tariff upon sugar over it, fixing the rate as twenty-three cents per hundred pounds, and after describing the business of the shippers The American Sugar Refining Company and The American Sugar Refining Company of New York and of the consignees, W. H. Edgar and Son, charges that on the 26th day of April, 1904, the defendants, the railroad company, Guilford and Pomeroy, entered into an unlawful agreement and arrangement with certain agents of the said shippers and consignees, whereby it was agreed that in the event of any sugars being shipped over the said line and of the full tariff rates being paid thereon, the railroad company would give a rebate of five cents for each one hundred pounds so shipped to be refunded from the lawful amounts paid as aforesaid, thereby reducing the said tariff by that amount for each one hundred pounds. The count then charges that during the months of April and May of the same year, certain consignments of sugar were made (the dates of shipment, numbers of way-bills and amount of sugar being specified) and the regular tariff rates were duly paid thereon; that pursuant to said agreement, on July 14th of the same year a claim for

$1,524.99, rebate and concession in respect to such sugars was presented by the aforesaid agents of the shippers and consignees, and that on the 31st day of August of the same year, the three defendants paid to "Lowell M. Palmer as agent of and for the benefit of" the said shippers and consignees, by way of rebate and concession in respect to the transportation of the said sugars under the said unlawful agreement and arrangement the said sum of $1,524.99.

As above stated, each of the remaining counts are in substantially the same form as the second count, the only difference being that the sixth count alleges with reference to shipments made during June, 1904, that the lawful rate was twenty-one cents per one hundred pounds and the amount of rebate agreed to and paid three cents per one hundred pounds.

The dates of shipment, of filing of claim, and the payment and amount of rebates in the respective counts are as follows:

SECOND COUNT.

Shipments made during April and May, 1904.
Claim filed July 14, 1904.
Rebate paid August 31, 1904 ..... $1,524.99

THIRD COUNT.

Shipments made during July and August, 1904.
Claims filed August 24, 1904 for July shipments, and September 23 for August shipments, respectively.
Rebate paid October 29, 1904..... $2,474.54

FOURTH COUNT.

Shipments made during September, 1904.
Claim filed October 20, 1904.
Rebate paid November 23, 1904 ..... $2,117.19

FIFTH COUNT:

Shipments made during October, 1904.
Claim filed November 17th, 1904.
Rebate paid December 29, 1904..... $1,971.44

SIXTH COUNT:

Shipments made during June, 1904 (Tariff rate, 21 cents; rebate, three cents).
Claim filed August 15, 1904.
Rebate paid September 14, 1904.....$539.40

SEVENTH COUNT:

Shipments made during April and May, 1904.
Claim filed July 14, 1904.
Rebate paid September 20, 1904.....$285.71

After the demurrers had been overruled the defendants were brought to trial on October 15, 1906, and the jury found a verdict of guilty against both of the defendants upon each of the six counts submitted. The court thereupon sentenced the defendant Pomeroy to pay a fine of $1,000 upon each of the six counts, or $6,000 in all, and the defendant railroad company to pay a fine of $18,000 upon each of the six counts, or $108,000 in all.

Mr. Pomeroy died after sentence and during a stay of judgment and before having taken an appeal. Mr. Guilford died pending the indictment and before trial of his case.

The shipper, The American Sugar Refining Company and the consignees, members of the firm of W. H. Edgar & Son have since pleaded guilty to similar indictments charging them with receiving the rebates described in the foregoing indictment, have been sentenced and paid the fines imposed.

## Facts Established at the Trial.

The case is remarkable for the flagrancy and lack of excuse by which the crime is shown to have been committed by the agents of the railroad company; for the methods systematically adopted in the offices of the railroad company to conceal the transaction and for the unimpeachable character of the evidence with

which each of these facts was finally established at the trial.

*(a)* The jurisdictional and formal facts as to the establishment of the through line by the defendant and its connecting carriers from New York to Detroit, the establishment, filing and publication of the lawful tariffs applicable to the shipments in question, and the shipments of the respective consignments of sugar, and the payment of the regular tariff rates thereon were established as alleged in the indictment by the admission of the defendants.

*(b)* It was further conceded that the defendant Guilford, as General Freight Traffic Manager, and the defendant Pomeroy, as Assistant Freight Traffic Manager,

> "were authorized to establish rates at which freight should be carried over the line of The New York Central and Hudson River Rail Road Company, and to unite with other companies in the establishment, filing and publishing of through rates" (fol. 63).

The witness Palmer further testified that on behalf of The American Sugar Company he consulted frequently with Guilford on the subject of rates over the New York Central and its auxiliary lines and that

> "his [Guilford's] decisions in regard to the rates were uniformly carried out" (fol. 73).

*(c)* It was further shown by witnesses that the sugar refining companies were engaged in refining sugars in Brooklyn and Jersey City and in selling through an office common to both companies their products throughout the country; that the firm of W. H. Edgar & Son in Detroit, was a concern to which such shipments were made (fol. 66); that these shipments were sent with the freight prepaid by

the refining companies (fol. 79, top p. 61); and that all instructions in regard to the roads over which the shipments should be routed and the rates of freight applicable to such shipments were received by the sales department from Lowell M. Palmer (fols. 66–68). Palmer was a director of one, if not both of the sugar refining companies (fol. 67), and maintained a regular office at which he, with the assistant Riley, acted as traffic manager of the sugar refining companies and handled their business of arranging with the different railroads the routes and rates over which the sugar should be shipped (fols. 67, 68).

*(d)* It will be noted that by thus selling all of their sugars with the rate prepaid by themselves and maintaining a recognized office for the purpose of handling their business with the railroads, the sugar refining companies kept themelves in a position most favorable to using their large business as a means of extorting favorable rates from the various competing carriers leading westward out of New York. The correspondence of April 11th and 26th, 1904, between Palmer, Guilford and Pomeroy mentions this advantage and shows how it was used.

On April 11, 1904, Palmer wrote to Guilford a letter marked "personal and confidential" in which he requested an 18 cent all rail special rate from New York to Detroit for the benefit of the Edgar business (Exhibit 20, p. 91). Careful study of this letter is well worth while. It incidentally exemplifies and records most of the evils supposed to inhere in the system of secret rates and discrimination.

1. It reveals the large shipper tempting the carrier to depart from its tariff and give a secret rate by promising to the carrier all of the business involved. Palmer says:

> "I think, if we could arrange to give him [Edgar] a net rate all rail, of 18 cents per cwt. to

> Detroit and the same relative basis to other Michigan points, that we could make an arrangement with him whereby these shipments would be confined strictly to the New York Central and West Shore Fast Freight Lines throughout the entire year" (fol. 120).

2. It reveals the large shipper using this proposed secret transportation favor to attempt to crush out competition. W. H. Edgar & Son were evidently closely related to the sugar refining companies as regular agents or otherwise. Palmer says:

> "Edgar is in a very trying position in the state of Michigan, with the severe competition that he is experiencing with the Michigan beet sugars and with Arbuckle Brothers, and it seems quite certain, from the position he has taken, that something must be done for him in the way of rates this season" (fol. 120).

3. It was the anticipation of Congress in framing the Interstate Commerce law that the competition of the water routes of the country would serve as a natural method of regulating the general rates of railway carriers and preventing such rates, where such competition existed, from becoming excessive (Senate Report No. 46, 49th Cong., 1st Sess., p. 170). This letter shows how the operation of the economic law anticipated by Congress is thwarted by the device of secret rates. Palmer writes that Edgar threatened to use the cheap method of water transportation. Normally under the system of equal and public rates established by Congress in the Interstate Commerce laws, the New York Central Rail Road Company, in order to meet such competition, would be obliged to reduce its regular tariff rate to all customers. But with the device of a secret rate accomplished by a system of rebates they were enabled, as this letter shows, to maintain the high level of their regular rates

towards other customers, while they secured Edgar's traffic by means of favoritism. As Palmer says :

> " If some arrangement of this kind cannot be made, it is quite certain that Edgar's business will be put on the canal and rate arranged on it by himself beyond Buffalo. * * * As you can easily see, this is a matter of the most vital importance, not only to us, but to the railroad companies, and I sincerely trust that you will see your way clear to giving us authority to make such an arrangement with Edgar as will confine his business to the all-rail route " (fols. 120, 121).

*(e)* On April 26th, 1904, Pomeroy replies to this letter with another marked " Personal and confidential," in which he agrees to grant this secret rate. The vital clause is as follows :

> " This is to advise that, taking effect immediately, we will undertake to handle Edgar's shipments for Detroit, and such shipments [as] are to be reforwarded from there to points on the Michigan Central R. R. at a rate of 18 (eighteen) cents per 100 lbs., New York to Detroit all-rail, *shipments to be billed at tariff rates and refund made by voucher* " (fol. 60).

The court will note well that none of the parties to this criminal arrangement were under any delusion as to its propriety or justification. There was no pre-existing *bona fide* contract with the shipper as in the *Armour* case (209 U. S., 56) to give color to the claim of fair play. There was no ignorance of the lawful tariff on the part of either writer as claimed in the Standard Oil case. The terms of the letters are postulated upon the existence of the lawful rate and record an intention to violate that rate. Thus the shipments are to be billed at the tariff rates and the concession is to be granted in a way which

will preserve its secrecy. Pomeroy says further in his letter:

> "The question as to Howell's being advised of this *private* arrangement with Edgar rests in abeyance until the writer can have a personal interview with you regarding same" (fol. 60).

The entire correspondence breathes secrecy and deceit.

(*f*) But further, in view of the main argument of the plaintiff in error, it is to be specially noted that both Palmer and Pomeroy expressly address themselves to a matter within the scope of Pomeroy's official functions and avowedly for the benefit of his corporation, the railroad company. It is not a matter in which Pomeroy has any private interest. It is not even a matter in which he gratuitously engages, stepping outside of his official functions for the purpose. On the contrary, he engages to make a rate on behalf of his corporation for the purpose of saving some valuable traffic for that corporation and his letter winds up with a statement of the consideration to be received by his company in return for the rate. He says:

> "As advised over the 'phone, I think it would be well to confine this arrangement to Edgar's traffic, as outlined above, leaving his traffic that is going to points on the Grand Trunk, Pere Marquette and G. R. & I. Roads to move via such lines as he may elect, *with the understanding that where he can favor either the West Shore or this company, as far as the haulage to Buffalo is concerned, he will undertake to do so*" (fol. 60).

(*g*) Thereafter this arrangement was carried out in such a way as to involve the connivance and co-operation of a large number of controlling agents of the defendant railroad company and with the utmost precaution to prevent the public or any competitors from learning of it.

1. The shipments having been made and the regular tariff rates paid during the month, at the close thereof Palmer's clerk, Leeming, would make up a claim on the basis of the agreed 5 cents per 100 pounds. (fol. 80.)*

2. These claims would be sent by Palmer to Pomeroy and then by Pomeroy to William F. Wilson (General Manager of The New York Central and Fast Freight Lines), in Buffalo, for payment. Wilson would then send back to Pomeroy, not one of the regular checks with which ordinary claims in respect of freight were paid, but a draft purchased at the Bank of Buffalo for the amount of the claim (fol. 78). Pomeroy would then send this draft to Palmer and obtain his receipt. All of the correspondence was marked personal. In order to make it clear we give in full the correspondence relating to one of the claims (Second Count) as shown by the exhibits.

EXHIBIT 21. PAGE 92.

Office of Lowell M. Palmer, 184 Front St.
Personal.

NEW YORK, July 14, 1904.

MR. F. L. POMEROY, F. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: Referring to your favors of June 22nd, and 23rd: I beg to advise that our Claims Nos. 36209 and 36251 have been cancelled on our records, and to take their place I now enclose our claims as follows:

Our No. 36476, Merchants Despatch ..... $ 285.71
Our No. 36476–A North Shore despatch 1,524.99

---

*During the month of June the regular tariff rate was temporarily lowered from 33 cents to 21 cents. A claim for a 5 cent rebate during that month was subsequently corrected to a 3 cent basis and payment made on the latter basis (fol. 81. Also Exhibit 37, fol. 129).

I believe these claims are now made up, in accordance with your request, and I would thank you to put them through for prompt adjustment.

Yours very truly,

LOWELL M. PALMER,

Enc. Per RILEY.

EXHIBIT 22. PAGE 92.

Personal A. McM. "P."

JULY 16, 1904.

MR. W. F. WILSON, General Manager, N. Y. C. & W. S. F. F. Lines, Buffalo, N. Y.

DEAR SIR: I hand you herewith claim of Lowell M. Palmer, his No. 36476-A for $1,524.99 covering shipment of sugar consigned to W. H. Edgar, Detroit, via the N. S. D.

Please arrange to reduce the charges on these shipments to basis of 18c. per 100 lbs. New York to Detroit, prorating on basis of earnings between the N. Y. C. and M. C. roads.

Yours truly,

Enc. F. L. POMEROY,

Freight Traffic Manager.

EXHIBIT 23. PAGE 93.

Personal. A.McM.

AUG. 30, 1904.

MR. T. P. RILEY, c/o L. M. Palmer, 184 Front St. N. Y.

DEAR SIR: I hand you herewith draft for $1524.99 in favor of L. M. Palmer covering your claim No. 36476-A. Kindly sign enclosed receipt and return to me promptly.

Yours truly,

F. L. POMEROY,

Freight Traffic Manager.

EXHIBIT 7. PAGE 85.

Bank of Buffalo. No. A28964.

BUFFALO, N. Y., Aug. 23, 1904. $1524.99.

CHEMICAL NATIONAL BANK, NEW YORK CITY.

Pay to the order of L. M. Palmer, fifteen hundred and twenty-four and 99/100 dollars.

Not over two thousand.

J. L. DANIELS,
Cashier.
By H. J. DUNN.

EXHIBIT 24. PAGE 93.

Personal. P.

NEW YORK, Sept. 1st, 1906.

MR. W. F. WILSON, Buffalo, N. Y.

DEAR SIR: Your letter August 23rd. I return herewith receipt for $1524.99 duly signed by Mr. L. M. Palmer.

F. L. POMEROY.

U. S.

3. The system by which the claims were handled within Wilson's office is also significant. This was the office which handled all claims against the fast freight lines of the New York Central and its affiliated companies (fol. 73).

Wilson admitted that the claims coming into his office were divided into two classes according to the routine in which they were handled. One class consisted of the claims for loss and damage, switching and terminal relations, etc. These claims passed through the hands of Presinger, the chief clerk, were vouchered and then passed over to the custody of the Central Clearing House in the same building (fols. 73–74). Such claims would then be paid by Board-

man, the cashier, by checks regularly drawn from regular check books to the order of the claimant (fol. 78). And the transaction would be posted by the general bookkeeping department (fol. 78). Such claims came direct to the cashier from the General Bookkeeper (fol. 78). These claims evidently represented all of the normal business claims against this freight department of the defendant company and were very much larger in volume that the class of claims to be now referred to (fol. 77). There was no evidence that any of these claims had ever been destroyed after they passed over from Wilson to the Central Clearing House.

In addition to these, there was another class of claims handled by Wilson's office. These latter were comparatively few as compared with the claims that went to the Central Clearing House. They were handled by a clerk of the name of John S. Embleton in Wilson's office. Wilson admitted that these claims were of the class of the Palmer claims numbers 37,100 and 36,876, which in plain language means claims for rebates (fol. 76, p. 59). Instead of going over to the Central Clearing House and being entered upon the regular books, these claims remained in the office of Wilson and were entered by Embleton in a book kept by him (fol. 75). Instead of being paid by regular checks drawn to the order of the claimant, they were paid by cashier's draft purchased from the Bank of Buffalo (fol. 78). Embleton would request Boardman, the cashier, to buy a draft for the amount of the claim, and this written request was apparently the only voucher for the payment (fol. 78). Embleton's initials appear in the correspondence between Wilson and Pomeroy concerning these claims (fols. 85-87; Exhibits 13, 14, 15, 16, 17).

Every three months these Embleton claims in the office of Wilson were audited and then destroyed (fol. 74), ostensibly for the purpose of making room, though they were much smaller in number than the others of which there is no record of destruction (fol. 77).

In March, 1906, Wilson was called before the grand jury in regard to this case (fol. 75), and in March, 1906, Embleton went away sick to Texas and had not returned up to the date of the trial. The book in which he kept a record of these claims had disappeared and not been seen since his departure (fol. 76).

4. It was conceded at the trial that the various cashier's drafts sent in payment of these claims were liquidated out of the funds of the defendant corporation.

## Outline of Argument.

The record, as thus briefly summarized in this statement shows that the unlawful arrangement was in the first place planned by the two chief officers to whom had been delegated power to make the rates charged by the Railroad Company, and who habitually exercised that power. When received by them the illegal claims (the forms under which the rebates were disguised) were sent by these officers to the regular head of the Bureau paying all freight claims of the corporation. They were then handled in a way which at once stamped them as secret yet regular and customary. They were then paid out of the corporate treasury and were finally audited and passed by the regular auditors of the corporation.

As modern railway corporations are organized the directors and presidents do not authorize or audit specific claims incurred in the course of their company's business. That work is invariably delegated to freight traffic managers, claim agents and auditors.

If punishment for such payments when prohibited by law can be administered only on proving authorization from the president or directors no railway corporation can ever be legally punished for such payments. But, on the other hand, if a railroad corporation may be made criminally responsible for the acts

of its officers or agents, to whom have been delegated power to control its corporate action *within the sphere represented by the transaction* then no case can more completely show ground for liability than the case at bar.

In urging the corporate liability in the present case the Government will maintain the following propositions :

FIRST. Under the commerce clause Congress has undoubted constitutional power to subject corporations to criminal prosecution and punishment to enforce more effectually the regulations regarding interstate commerce.

SECOND. This power was exercised in the passage of the Elkins Law which only applies to, or, at all events, is constitutional when only applied to corporate carriers.

THIRD. Congress has constitutional power to provide that a corporate common carrier shall be criminally liable for the acts of "any person acting for" such corporation, for acts "within the scope of his employment." Such a statute is merely declaratory of a rule of corporate liability firmly established by this Court.

FOURTH. The Elkins Law makes both the carrier corporation and its guilty agent cumulatively liable and permits their joinder and prosecution in one trial.

FIFTH. While the question is not properly raised in this case, Congress has undoubted power to punish both the carrier corporation and one of its guilty stockholders for the violation of "regulations of interstate commerce" enacted "within the acknowledged power of Congress under the Interstate Commerce clause." For the corporation and its constituent stockholders are distinct legal persons, separately responsi-

ble to the law and Congress may properly punish by separate punishment distinct offenders.

SIXTH. The whole contention of the plaintiff-in-error reduces itself to a plea of complete corporate immunity for public wrongs, and thus is an effort to revive a view of corporate liability unfounded in reason, disastrous in result and universally repudiated by the Courts.

SEVENTH. The plaintiff.in-error was properly charged and convicted for six separate offenses, for each of which a separate punishment was properly imposed.

EIGHTH. The indictment is free from formal defects and none of the other objections of the plaintiff-in-error is well taken.

## The Statute.

The Elkins Law (32 Stat., 847) reads as follows:

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a

misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being here abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and comp'eted in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction

in the same manner as if the offence had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

## POINT ONE.

**Congress has power, in the exercise of its constitutional function of regulating commerce, to enact laws which subject corporations to criminal prosecution and punishment.**

Our opponents have evidently been driven to the startling proposition of their First Point by the fact that this proposition necessarily underlies the other cardinal propositions of their brief. We do not deem it necessary to argue at length this first proposition. We shall discuss under later points some of the fallacies which seem to us to underlie their present argu-

ment. The indictability of a corporation for crime is a legal doctrine too well settled by authority to require at the present day argument in this Court.

**1.** It is sufficient to point out that at least nine convictions of corporations for criminal offenses have been brought to this Court within the last four years, and in most of those cases the judgments of convictions have been here affirmed. If the laws under which such corporations had been convicted were unconstitutional and void and if the members of such corporations had been deprived by those criminal judgments of their property without due process of law it would have been the duty of this court, even on its own motion, to set aside the judgments and dismiss the indictments.

*Berea College vs. Commonwealth*, 211 U. S. (decided November 9, 1908).
*Armour Packing Co. vs. United States*, 209 U. S., 56.
*Swift & Co. vs. United States*, 209 U. S., 56.
*Chicago, Burlington & Quincy Rway. Co. vs. United States*, 209 U. S., 90.
*Great Northern Rway. Co. vs. United States*, 208 U. S., 452.
*Eastern Dredging Company vs. United States*, 206 U. S., 246.
*Bay State Dredging Company vs. United States*, 206 U. S., 246.
*Union Bridge Co. vs. United States*, 204 U. S., 364.
*Hackfeld & Co. vs. United States*, 197 U. S., 442.

Furthermore, the important decision rendered by this Court in *Hale vs. Henkel*, 201 U. S., 43, that the constitutional immunity against self-crimination does not shield a corporation was pointless and unnecessary if a corporation, as now contended, enjoys complete constitutional immunity from all criminal prosecution.

**2.** Nor do we deem it necessary to argue the right of Congress specifically to exercise its power over in-

terstate commerce by the use of criminal penalties. As was said by this Court:

> "There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of the powers with which it is intrusted. * * *
>
> "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States."
>
> *United States vs. Fox*, 95 U. S., 670, 672.
> Also, *United States vs. Hall*, 98 U. S., 357.

> "By virtue of its dominion over interstate commerce Congress has power * * * over corporations engaged in that commerce."
>
> McKenna, J., in *Hale vs. Henkel*, 201 U. S., p. 82.

> "The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by the Act of Congress."
>
> *Hale vs. Henkel*, 201 U. S., 43, 75.

**3.** Such a position as that contended for by our opponents would not only invalidate those wholesome provisions of the Elkins Law, by which the former impotent Interstate Commerce Act was vivified, but it would also render void a large number of other important federal statutes in which provisions for the criminal liability of corporations occur. Among such instances, the Court will remember the Railroad Safety Appliance Act, the Sherman Anti-Trust Law, the Pure Food and Drugs Law, the Lottery Law, the Postal Violation Law, and, in fact, all statutes under which, since the Statutory Construction Law of 1871

(Act Feb. 25, 1871, Sect. 1 R. S. U. S), corporations are now being held criminally responsible.

Furthermore, if our opponent's astonishing argument to the effect that criminal punishment of a corporation deprives the stockholders of their property without "due process of law" (Brief of Plaintiff-in-Error, bottom p. 37 and top p. 38) were well founded, it would result that under the Fourteenth Amendment every state statute making corporations criminally liable is in violation of the federal Constitution and every one of the innumerable convictions which are a part of the well-established policy of all of our states, could be set aside on appeal to this Court. For "due process of law" has been given the same meaning in the Fourteenth as in the Fifth Amendment when the question has arisen (*French vs. Barber Asphalt Paving Co.*, 181 U. S. 324).

It is fair to call attention to these drastic results as indicative of the temerity with which our opponents have taken up their fundamental position which logically underlies their appeal.

**4.** What an outcast and rejected doctrine the plaintiff-in-error now urges on this Court is evidenced by the quotation approvingly cited from *State vs. Great Work Mills Co.*, 20 Me., 41, as authority for the proposition that a corporation can commit no crime. This case, after being repudiated in Vermont and New Jersey, was expressly overruled twenty-five years ago, by the Court which enunciated it (*State vs. Portland*, 74 Me., 268, 273). And the variety and large number of offenses for which corporations have been held criminally liable crushingly demonstrates the fanciful and archaic contention of the plaintiff-in-error;

*State vs. Morris R'way Co.*, 23 N. J. Law, 360 (Creating a nuisance in erecting and building a public highway).

*State vs. Passaic Co. Society*, 54 N. J. Law, 260 (Keeping a disorderly house).

*United States vs. Kelso*, 86 Fed. Rep., 304 (Violation of Eight-Hour Law).

*United States vs. Alaska Packers' Association*, 1 Alaska, 217 (Taking salmon unlawfully).

*The State vs. The B. & O. R. R. Co.*, 15 W. Va., 362 (For Sabbath breaking).

*Commonwealth vs. Pulaski Association*, 92 Ky., 197 (Permitting gaming on its fair grounds).

*State vs. Atchison*, 3 Lea (Tenn.), 729 (Criminal libel).

*State vs. Natl. Bank*, 2 So. Dak., 568 (For taking usurious rates of interest).

*United States vs. Van Schaick*, 134 Fed. Rep., 592, 602 (Homicide, occasioned by an inadequate supply of life preservers).

*United States vs. McAndrews & Forbes Co.*, 149 Fed Rep., 836 (Violating Sherman Anti-Trust Law against conspiracy in restraint of trade).

*United States vs. New York Herald Co.*, 159 Fed., 296 (Sending obscene matter through the mail).

## POINT TWO.

**The case at bar involves the constitutionality of the last paragraph of Section One of the Elkins Law only in so far as it applies to corporate carriers.**

This paragraph reads as follows:

> "In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. When-

ever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, *its* officers or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

The first and main argument of our opponents under their Second Point is based upon the assumption that the foregoing provision applies to individual carriers as well as corporate carriers. They argue that this provision "makes the crime of A the crime of B as a matter of law" and that it is not "due process of law" because it deprives B of the fundamental principle that the accused is presumably innocent until he is proved beyond a reasonable doubt to be guilty (Brief of Plaintiff-in-Error, pp. 53-55). They then argue that the statute, being unconstitutional as to an individual carrier and incapable of separation as to a corporate carrier, is void *in toto*. It is unnecessary to discuss the constitutionality of this statute in relation to individuals, because each of their other propositions is clearly unfounded.

A.

*The recent Berea College Case disposes of the whole contention.*

The decision of this Court in *Berea College vs. Commonwealth*, decided November 9, 1908, completely disposes of the main contention in Point Two of our opponents' brief that the Elkins Law is unconstitutional, because it applies to individual cariers as well as cor-

porate carriers. In that case this Court has just held that a statute making it unlawful "for any person, corporation or association of persons" to maintain a college for the education of white and black pupils is constitutional and valid when applied to a corporation irrespective of its validity as applied to persons. Speaking through Mr. Justice BREWER this Court said:

> "Such a statute may conflict with the federal constitution in denying to individuals powers which they may rightfully exercise, yet at the same time be valid as to a corporation created by the statute.
>
> * * * * * *
>
> "It is unnecessary for us to consider anything more than the question of its validity as applied to corporations."

This decision is precisely the case before the Court, assuming that our opponents contention as to the constitutionality of the Elkins Law towards an individual carrier were well-founded.

B.

*As a matter of fact, this paragraph of the Elkins Law does not apply to individual carriers.*

This is proven conclusively both by the history and the language of the entire Section 1 of the Elkins Law, as well as of this provision. The main purpose of the enactment of the Elkins Law was to make corporations criminally responsible where under the old law it had been held that only the agents were so responsible. The constantly repeated recommendations of the Interstate Commerce Commission in response to which the Elkins Law was enacted, lay stress on no other point as often as on this.

In its report of January 17, 1902, immediately before

the enactment of the Elkins Law, the Commission said:

> "It was undoubtedly the intent of the tenth section of the act to impose a penalty upon the corporation itself. Under its peculiar phraseology it has, however, been judicially determined that the corporation is not liable. The agent alone can be punished. Now, the object of rate cutting is to get business and make money. The corporation, if anyone, profits by the illegal act. The corporation is the real offender and ought certainly to pay the penalty as well as its officer. It is anomalous and unjust that the representative or employee only should be liable to prosecution, while the real offender, the corporation, which is the principal and beneficiary in the transaction, is not subject to punishment. If every illegal act of that character subjected the carrier to a substantial forfeiture, so that the money result of the transaction was likely to be the other way, the inducement to commit such offenses would be greatly diminished" (p. 7).

See, also,

*6th An. Rep. Int. Com. Com.* (1892), 39.
*7th An. Rep. Int. Com. Com.* (1893), 78.
*9th An. Rep. Int. Com. Com.* (1895), 23.
*10th An. Rep. Int. Com. Com.* (1896), 115.

Here it should be remembered that the original Interstate Commerce Act and the Elkins Law were both limited to railway carriers, and from the report of the Cullom Senate Committee (1885), and the first Annual Report of the Interstate Commerce Commission, it is clear that neither of those bodies were concerned with railway carriers other than corporations (Senate Report No. 46, Forty-ninth Congress, 1st Session, p. 10; First Annual Report Int. Com. Com., p. 1).

The history of the Elkins Act and an examination of the provisions relating solely to carriers clearly show that it was passed in view of the existing

fact that all interstate carriers subject to the act were corporate carriers. Thus, the first two penal provisions of the Elkins Law expressly describes the carrier to which they apply as "corporation common carriers." The second clause, the vital provision penalizing failure to observe the public tariff, limits the punishment to corporations. It is incredible that Congress in its effort to stamp out rebating and procure equality of rates, would have limited this provision to corporate carriers if it had deemed that there were any other carriers within the purview of the Act.* When we reach the concluding paragraph of the First Section, which again relates wholly to carriers, it must be construed *in pari materia* with the other provisions which exclusively relate to carriers as applying wholly to "corporation common carriers."

And the concluding paragraph taken by itself clearly indicates that the provisions of that paragraph are limited to corporate carriers The two sentences contained in that paragraph are of course *in pari materia.* They are both provisions containing rules of statutory construction of the preceding portion of the section, and historically both were suggested by the Interstate Commerce Commission in its Eleventh Annual Report of 1897. (See Government Brief in No. 285, Point One.)

Therefore, the use of the word "carrier" in the first sentence of the last paragraph is evidently the same as its use in the second, and the second sentence is evidently intended to refer only to a corporation carrier by the use of the pronoun "*its*" in defining the officers and agents of such a carrier. We submit,

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* The third penal provision, relating to rebates, it is true, includes others than corporations. This is necessarily so, because this provision affects shippers as well as carriers. And it is also the provision which is intended to reach and punish the agents of both carriers and shippers. Therefore, by its context, the word "person" here, unlike in other provisions, is applicable to both corporations and natural persons.

therefore, that instead of this paragraph being a general and inapplicable provision of the law relating to and embracing imaginary and non-existent individual common carriers (which is the basic contention of Point Two of our opponents brief) it is, on the contrary, shown by its history and the language to be limited only to corporation common carriers, which were the only carriers in the legislative mind. And that our construction is the one which our friends themselves placed upon it on the trial below, is evidenced by this assignment of error:

> "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier *corporation* shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (Assignment of Error, 93, p. 109).

C.

*In any event, the first paragraph of the Elkins Law which contains similar provisions and provisions upon which the judge's rulings could be sustained is expressly limited to "corporation common carriers."*

Even if our friends should succeed in persuading the Court that the final paragraph of the Elkins Law is unconstitutional and void it would avail them nothing. Substantially similar provisions occur in the opening paragraph, which is expressly limited to corporation common carriers, and upon those provisions the rulings of the trial court could well stand.

## POINT THREE.

**The so-called fourth clause of Section 1 of the Elkins Act which declares that in construing and enforcing the provisions of that section, "the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person," is not only constitutional but is merely the statutory enactment of a rule of law already applied by this court in establishing liability of a corporation for the wilful wrong of its agents.**

As we have just pointed out, the main argument of the Second Point of our opponents' brief is based upon the assumption that the foregoing clause is unconstitutional in that it applies to individual carriers, a position which is disposed of by the *Berea College* case. They then argue briefly, that even if the clause were limited to corporations, it would still be unconstitutional because it discriminates between corporations and natural persons (Brief, p. 61). This argument requires merely a word in reply.

**1.** There is a vital difference between corporations and natural persons in their respective relation to their agents and in the responsibility of either for the acts of those agents. This difference was clearly pointed out by the Judge below:

> "The cases which have been cited of an individual master and individual servant are essentially different. The argument is very weighty in those cases, but [and] where the individual ser-

vant is guilty of the criminal act in the course of his master's business and there is no evidence whatever that the master consented to it or had anything to do with it, the general principle of law would be that a statute making the master criminally punishable in such a case as that was invalid. But a corporation is an essentially distinct entity. *It only acts by its officers and there is no such separation between the corporation and its officers,* although they discharge duties which make them for certain purposes under the civil law servants and the relation between them is that of master and servant under the civil law, yet the relation is essentially different from that which would be the relation between an individual master and an individual servant, and I think it is entirely competent for Congress to provide that a corporation shall be criminally liable for the acts of its agents which constitute crimes if it sees fit to do so" (fols. 56 and 57).

The statute, therefore, applies to all of the members of a similar class (corporations) and excludes from its application only a class (natural persons) which in respect to the subject matter of the statute are wholly different. Such a classification is perfectly constitutional.

*Field vs. Barber Asphalt Pav. Co.*, 194 U. S., 618, 621.
*Atchison Co. vs. Matthews*, 174 U. S., 96, 104.
*Dow vs. Beidelman*, 125 U. S., 680.

Furthermore, it is a fact of such common knowledge that the class of individual railroad carriers in this country is practically non-existent that this Court may well take judicial notice of the fact. The history of the enactment of the Interstate Commerce Law and of this particular section of the Elkins Act, as we have already pointed out, is postulated upon that fact. The reports of the Committees upon which the legislation was framed, the debates of Congress,

and the reports of the Interstate Commerce Commission all unite in showing that the legislation, both of 1887 and of 1903, was aimed at corporate carriers because no others practically existed. Congress legislating with a view to existing conditions, dealt with the whole class to which the subject-matter applies. The discrimination, therefore, upon which our learned friends rely, is artificial and imaginary.

*Michigan Central R. R. Co. vs. Powers*, 201 U. S., 245 (sustaining a tax statute which treated as a separate class all railroad corporate property for purposes of taxation).

See, also, *Metropolitan Street Railway Co. vs. New York*, 199 U. S., 1, 47.

**2.** This Court has frequently held that a coporation could be held responsible for the wrongs committed by its agents, even where those wrongs necessarily involved malicious intent. The development of this doctrine *ex necessitate* was clearly pointed out by Mr. Justice MILLER:

> "The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract but are arbitrary exercises of power in the nature of torts, or are *quasi* criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."
>
> *Salt Lake City vs. Hollister*, 118 U. S., 256, 260.

In the cases involving punitive damages, where malice is a necessary ingredient of the offense, this court has held that the malice of the individual agent

could be " imputed " to the corporation for the purpose of holding it pecuniarily responsible for the wrong

> " A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. * * * A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. * * * No doubt, a corporation, like a neutral person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation."
>
> *Lake Shore & Michigan Southern Railway Company vs. Prentice*, 147 U.S., 101, 109-11; see also *Denver & Rio Grande Railway vs. Harris*, 122 U. S., 597.

The doctrine announced in these cases is controlling also upon criminal cases. There is certainly no greater logical difficulty in making a corporation responsible for the criminal intent of its agent than there is for making it responsible for his malice. In both cases the responsibility arises out of public policy. In both cases the responsibility is satisfied out of the corporate funds. It is even more appropriate that the compensation exacted for this corporate responsibility should be paid to the State as *parens patriæ*, as in the case of a crime, than that it should be paid, as in the case of punitive damages, to a private individual :

> " We think that a corporation may be liable criminally for certain offenses of which a specific

intent may be a necessary element. *There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.* * * * A corporation cannot be arrested and imprisoned in either civil or criminal proceedings but its property may be taken either as compensation for a private wrong or as punishment for a public wrong."

*Telegram Co. vs. Commonwealth*, 172 Mass., 294, 297.

Judge HOUGH, in the case quoted at length on pages 38 to 40 of our opponents' brief, expressed it as follows:

"It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest."

*United States vs. McAndrews & Forbes Co.*, 149 Fed., 823, 836.

"To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant. If a corporation can corporately know that an engineer is a habitual drunkard (Cleghorn v. N. Y. Central, etc., R. R. Co., 56 N. Y., 44; 15 Am. Rep., 375), it can even more surely know the ordinary contents of a newspaper the publication of which is its sole reason for existence."

*United States vs. N. Y. Herald Co.*, 159 Fed., 296, 297 (Indictment for mailing obscene matter).

See, also, Lord BLACKBURN's opinion in Pharmaceutical Society vs. Provincial Supply Association, 5 App. Cas., 857, 869 (1880).

**3.** This is particularly true in a case like the one now before the Court, where the offense itself "does not involve turpitude or moral wrong." As this Court has interpreted the Elkins Law the only intent required on the part of the offender is "purposely doing a thing prohibited by statute."

*Armour Packing Co. vs. United States*, 209 U. S., 56, 85.

See, also, *Eastern Dredging Co. vs. United States*, 206 U. S., 246, 257.

It was not necessary in the case at bar to impute to the Railroad Company any such malice or willful wrongdoing as was involved in the *Prentice case, supra*, or the other punitive damage cases. If a rate lower than twenty-three cents per hundred pounds on freight transported from New York to Detroit was intentionally given at a time when the lawfully established tariff rate was twenty-three cents, a crime was committed. And it is no more difficult to impute to the corporation an intention, existing in the minds of the two officers "authorized to establish rates" for the corporation, to make a rate lower than the regular tariff, than it is to impute to it an intention to make a rate equal to the tariff rate, on which last intention any suit brought by the Railroad Company against its customers for freights must necessarily depend. If the difficulty of corporate mentality now insisted upon by its counsel were well founded, the New York Central Railroad Company could never maintain its rights of contract as carrier.

**4.** Thus this clause of the Elkins Act, instead of being an arbitrary and unconstitutional use of power by Congress, is merely a statute declaring and enacting in the case of this class of offenses the rules of law

which this court (no less subject than Congress to the "due process" limitation) have established in other corporate cases:

> "We do not mean that in order to render the company liable there must be some evidence of authority, expressed or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence *from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself.*"
>
> *Washington Gas Light Co. vs. Lansden*, 172 U. S., 534, 545.

Of course, the executive power of a modern railway corporation in matters pertaining to its ordinary railway business is not exercised by its higher officers and directorate. It is universally delegated to other officials and agents. These officials and agents, for the purposes of the transaction in question, exercise "all corporate powers." Their acts and decisions in contractual matters regularly bind and make responsible the corporation. The rates fixed by the freight traffic manager are regularly the rates at which the corporation is bound to carry the goods. The penal provisions of the Interstate Commerce and Elkins Law here considered are at bottom merely limitations upon the right of contract of the carrier in respect to freights. This provision of the Fourth Clause of Section 1, making the carrier responsible for the acts of its agent "acting for" the carrier and "acting within the scope of his employment" when applied to the general freight traffic manager, merely result in making the corporation responsible for his failure to obey the limitations which Congress lawfully imposes on the sphere of his conduct when that corporation is already responsible for his acts throughout the entire sphere.

Nor is there anything in the provisions of this Fourth clause which when properly construed by the courts will yield any more radical or more dangerous results in other cases than those shown by the facts of this case to be necessary and salutary. The very language of the provision defining the officer or agent as a "*person acting for*" the carrier and limiting the responsibility for acts "*within the scope of his employment*" show that it was clearly the intention of Congress to confine the effect of this law to cases where the *agent in effect was vested with the corporate powers as far as the transaction in question was concerned.* Before a corporation can be held liable under this clause the question of fact must always be determined whether the agent was, in the transaction in question, exercising the powers of the corporation, and the Court would always retain power to protect the corporation against liability in improper cases. The present attempt to distort the meaning of the provision by a strained and fanciful construction should not be permitted to nullify a statute, which when reasonably construed, is wise and proper and merely affirmative of well established principles of law.

**5.** Thus, our learned opponents' contention that the statute automatically makes the corporation responsible for *every* act of *every* agent is incorrect in law. The record also shows that the learned Judge below took no such view of the statute.

The Court expressly charged :

> "It is for the jury to say whether the corporation pays back a rebate intending to pay it as a rebate. It is for the jury to say whether it intended to violate the law or not." (Fol. 108.)

He also charged at the request of the defendant :

> "That the mere fact that letters by Pomeroy bore the letterhead of the New York Central and Hudson River Railroad Company was not of itself evidence of knowledge by those controlling the

corporate action of any unlawful act on the part of either Pomeroy or Guilford" (fol. 108.)

He also charged:

"That in order to justify a verdict of guilty against this defendant it is not enough for the Government to prove that the defendant Pomeroy offered to give or did give rebates on sugar carried by this defendant" (fol. 101). "I so charge: There might be rebates given for a legitimate purpose" (fol. 109).

And again:

"That in order to prove that this defendant corporation authorized the giving of rebates it is not enough for the Government to prove merely (that) the giving thereof by Guilford and Pomeroy, together with the fact that thereafter certain claims were presented and paid out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo" (fols. 101–102). I so charge. It might take place in an honest way" (fol. 109).

And again:

"That it is not for this defendant corporation to prove a negative *and show that it did not authorize the giving of rebates but it is for the Government to show such authority and to show it beyond a reasonable doubt*, and no unfavorable inference must be drawn against this defendant corporation because it called no witnesses" (fol. 109).

Finally, as complete disproval of the plaintiff-in-error's contention that the Judge below instructed the jury to the effect that the act of the agent automatically and necessarily made the corporation guilty, it appears that the Court expressly instructed the jury that they might find *either the agent or the corporation or both guilty* (fol. 97).

## POINT FOUR.

**The defendants were properly joined in the indictment, and the Elkins Law permitting such joinder is constitutional.**

A.

*A violation of the Elkins Act is capable of joint commission.*

That the offense of departing from the published tariff and giving a rebate may, and, in fact, usually will be, committed by several persons in concert cannot be doubted, and is hardly disputed. The case at bar is an example of such joint commission of crime by Guilford and Pomeroy.

It is, of course, the general rule that where two or more persons join in the commission of an offense they may be jointly indicted.

*United States vs. McGinnis*, 26 Fed. Cas., 15,678.

*State vs. Lehman*, 182 Mo., 424 (with full collection of authorities).

*22 Cyc., 373.*

The offense is made by the statute a misdemeanor, and under the elementary rules of criminal law all persons procuring the commission of the offense or participating therein are principals.

B.

*The Elkins Act expressly added the liability of a carrier corporation to that of its individual officers and agents.*

**1.** This appears from the express language of the statute:

> "That anything done or omitted to be done by a corporation common carrier * * * which,

if done or omitted to be done by any director or officer thereof, or * * * agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall *also* be held to be a misdemeanor committed by such corporation, etc."

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case, be *also* deemed to be the act, omission, or failure of such carrier *as well as that of the person.*"

**2.** The history of these enactments also shows that this liability of the corporation was not substitutionary but cumulative. The officer or agent was already liable and Congress now charged also the principal. The sponsor of the Bill on the floor of the House said in support thereof in the brief debate which took place upon its enactment:

"In consonance and in harmony with the oft-repeated recommendation of the Interstate Commerce Commission, we propose what? To make the individual less culpable? No, the gentleman from Missouri to the contrary notwithstanding. * * * I say that there is no repeal from first to last in all this legislation. I say that there is no repeal of the present statute making culpable and responsible criminally the individual under the Interstate Commerce Law. But in addition we make the corporation liable criminally. *The subordinate is now under the law, and to that we add by this statute the culpability and criminality of the master, the corporation.*"

36 Cong., Rec. 2158.

The report of the Interstate Commerce Commission for 1903 contains a contemporaneous administrative

construction of the Elkins Law by the Commission, which says:

> "In the first place, the recent amendment makes the railway corporation itself liable to prosecution in all cases where its officers and agents are liable under the former law. Such officers and agents continue to be liable as heretofore, but this liability is now extended to the corporation which they represent."
>
> 17th An. Rep., Int. Com. Com. (1903), 8.

It is perfectly clear from these contemporaneous expressions of authoritative opinion that Congress intended by the Elkins Law to make both the individual and the corporation jointly and cumulatively and not merely alternatively liable.

**3.** In criminal prosecutions which have been brought under this statute since its enactment, it has been the common and constant practice to indict at the same time the officers and agents, and their master, the corporation. In no case, except the present, has that practice been challenged, so far as we are aware.

UNDER THE ELKINS ACT.

*Northern District of Illinois:*

United States vs. Chicago & Alton Ry. Co., John M. Faithorn and Fred A. Wann, December 13, 1905.

United States vs. Chicago, Burlington & Quincy Ry. Co., Darius Miller and Claude G. Burnham, December 29, 1905.

*Western District of Missouri:*

United States vs. Chicago & Alton Ry. Co., John M. Faithorn and Fred A. Wann, December 15, 1905.

*District of Minnesota:*

United States vs. C., St. P., M. & O. Ry. Co., H. M. Pearce, E. B. Ober and F. C. Gifford, November 8, 1906.

United States vs. Gt. No. Ry. Co., B. Campbell, W. W. Broughton, H. A. Kimball and D. G. Block, November 8, 1906.

United States vs. Gt. No. Ry. Co., B. Campbell, W. W. Broughton, H. A. Kimball and A. G. McGuire *et al.*, November 8, 1906.

United States vs. Gt. No. Ry. Co., W. W. Broughton, G. I. Sweeney *et al.*, November 8, 1906.

United States vs. Wis. Cent. Ry. Co., Burton Johnson and George T. Huey, November 8, 1906.

United States vs. Minn. & St. Louis R. R. Co., J. T. Kenny, November 8, 1906.

UNDER THE SHERMAN ACT.

*Middle District of Tennessee:*

United States vs. Virginia-Carolina Chemical Co., *et al.*, May 25, 1906.

*District of Oklahoma:*

United States vs. Chandler Ice and Cold Storage Plant and John W. Graves, September 19, 1906.

*District of Arizona:*

United States vs. Peoples Ice and Fuel Co. and L. B. Lount, October 23, 1906.

United States vs. Demund Lumber Co., T. W. Chamberlain Lumber Company, Valley Lumber Company, H. W. Ryder and H. P. Demund, October 23, 1906.

United States vs. Phœnix Wholesale Meat and Produce Co., P. J. Hurley and S. J. Tribolet, October 23, 1906.

*District of Columbia:*

United States vs. American Ice Company, Samuel A. Kimberly, George F. Hoover, Chapin-Saks Manufacturing Co., Arthur C. Chapin and Samuel Redman, July 12, 1906.

The point was expressly raised and decided in an indictment under the Sherman Law in the United States Circuit Court for the Southern District of New York. In that case two corporations, together with their respective presidents, were indicted under the Sherman Anti-Trust Law and demurred on the ground that the joinder was improper. The Court said:

"This is learnedly and fully treated by VAN BRUNT, J., in *People v. Clark* (O. & T.), 14 N. Y. Supp., 642, and I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. This procedure has been followed in *People, etc. v. Detroit White Lead Works*, 82 Mich., 471, * * * and in *Overland Cotton Mills v. People, etc.*, 32 Colo., 263, * * * nor do I think the holding in the rebate case (*United States v. N. Y. C. & H. R. R., et al.*, lately decided in this Court, 146 Fed., 298), irrelevant to the present issue. The indictments in these cases were based upon those clauses of Section 1 of the Act of Feb. 19, 1903 ('Elkins Act'), * * * which declares that 'anything done * * * by a corporation * * * which if done * * * by any * * * officer thereof * * * would constitute a misdemeanor * * * shall also be held to be a misdemeanor committed by such corporation,' and 'every person or corporation who shall * * * grant or give * * * any * * * rebate * * * shall be deemed guilty of a misdemeanor.' This is not a specific authorization for a joint indictment; it is a declaration that the same act shall at one and the same time be a misdemeanor on the part both of the officer, who is the actor, and the corporation, who suffers him to act. The language of that statute seems to me to render a joint indictment permissible, but if, as in this case and under this statute, that which is complained of is not one single act, which is at the same time individual by nature and corporate by act of Congress, but a condition of facts to which both corporate and individual action may be contributed, a joint indictment is not only permissible, but, if it be desired to bring in all the

actors and produce all the evidence, it may even be necessary."

*United States vs. MacAndrews & Forbes Co.*, 149 Fed. Rep., 823, 832, 833.

In the following cases, as a matter of common law, apart from the statute, no difficulty was found in joining a corporation with its officers or agents, and no question was raised as to the propriety of such joinder.

*State vs. Atchison*, 3 Lee (Tenn.), 729.
*Banner Pub. Co. et al. vs. State*, 16 Lee, 176.
*People vs. Detroit White Lead Works*, 82 Mich., 471.
*Overland Cotton Mill vs. People*, 32 Colo., 263.
*Thompson on Corporations*, Sec. 4495.

**4.** As a matter of policy, such joinder is conducive to the proper administration of justice. It accomplishes the law's purpose by one trial without useless duplication, and it is well settled that defendants jointly indicted cannot demand a separate trial as of right (*United States vs. Marchant & Co.*, 12 Wheat., 480). Such a doctrine is peculiarly applicable to indictments against a corporation and individual defendants where practically the identical evidence is adducible against both classes of defendants.

C.

*The plaintiff-in-error is in no position to question the constitutionality of the Elkins Act in permitting such joinder; but even if it were, the Act will be found clearly constitutional.*

The plaintiff-in-error argues that if the agent of the corporation were also a stockholder of the corporation the "result would be to punish twice acts

committed by the individuals in fact and imputable to the corporation only by a legal fiction " (Brief, Plaintiff-in-Error, p. 85). Also for the further reason that such enforcement would subject a stockholder agent "to a different and greater punishment" than could lawfully be imposed upon an individual not a stockholder who commits the same acts (Brief, Plaintiff-in-Error, p. 85).

**1.** In the first place no such question arises upon this record. There is no evidence that either Guilford or Pomeroy were stockholders of the defendant corporation. If such had been the case the only method in which the special disability of such stockholder could be presented, even assuming that it were a defense, would be by a special plea, setting up the facts and bringing it to the attention of the Court *(United States vs. Wilson*, 7 Peters, 150, 160 ; *Bishop's New Criminal Procedure*, Sec. 81).

Such an objection, therefore, taken in this case is fanciful and supposititious, and this Court will not listen to a constitutional argument raised in such a manner.

> " But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this Court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."
>
> *Hatch vs. Reardon*, 204 U. S 152, 160.

**2.** ***But on the merits of the contention itself the position of the plaintiff-in-error is fundamentally absurd.***

In the first place it is a little difficult to perceive how a statute whose penal provisions are expressly limited to the imposing of a fine, can, under *any circumstances*, put *any defendant* "twice in jeopardy *of life or limb.*"

But passing that preliminary objection the vital error in the whole of the contention of our opponents lies in its assumption of the identity of a corporation with its stockholders. This error underlies their entire argument from the beginning to the end of their brief, and crops out constantly under their different points. They disregard a fundamental conception of corporate law which is as essential in criminal remedies as in civil—a conception which is not only a theory of law but which furnishes the broad principle upon which men act in deciding whether or not they will enter corporate relations. When any number of individuals decide to incorporate their business, as in the supposititious cases put by our opponents on pages 80, 62, 64 and 65 of their brief, they succeed thereby in divesting themselves individually of certain important liabilities and transferring them to the fund represented by the corporation. They are no longer individually responsible for its debts. They are no longer individually liable for the acts of others of its agents than themselves. These are the great reasons why men incorporate their business and in these respects such individuals have received from the State the right to an important curtailment of the liabilities which they otherwise would be under. In these respects the creditors of that business and the State have only the fund of the corporation to which to look.

Now, if these individuals after having divested themselves of *personal responsibility*, were able to impute to their corporation and to its business all of the *personal immunities* and *rights* peculiar to them as natural persons and not necessarily appurtenant to the business, they would have succeeded by the act of in-

corporation in taking an undue advantage of the State. Their business thus incorporated would enjoy all the rights peculiar to natural persons with none of the responsibilities of such persons. Such incorporation would be a game of "heads I win, tails you lose."

We feel disposed to apologize for taking the Court's time with the statement of a position so elementary, but it has been made necessary by the fact that the contrary position underlies the whole argument of the other side. The authoritative decisions of this Court make it clear that this basic contention is unfounded; that the privileges and immunities possessed by the stockholders are not *ipso facto* those of the corporation:

> "If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in the matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to

be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. *Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.*

*Bank of Augusta vs. Earle*, 13 Pet., 519, 586; see, also, *Paul vs. Virginia*, 8 Wall., 168.

The case of *Hale vs. Henkel*, 201 U. S., 43, *supra*, is a complete denial of our opponents' contention. It was there held that a corporation was not entitled to the guarantee of the fifth amendment against self-crimination. If our opponents' doctrine that a corporation is entitled to all the personal guarantees and privileges of its individual stockholders were well founded, then in that case The American Tobacco Company properly asserted the constitutional rights of its stockholders. Of course, the decision of this Court in denying to the corporation a constitutional right which the stockholders undoubtedly possess is a complete denial of our opponents' contention.

Mr. Justice FIELD, sitting in Circuit, held flatly that the double jeopardy provision of the fifth amendment is limited to natural persons.

> "From the nature of the prohibitions in this amendment it would seem, with the exception of the last one ["nor shall private property be taken for public use without just compensation"], as though they could apply only to natural persons. No others can be witnesses; *no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves.*"
>
> *Railroad Tax Cases*, 13 Fed., 722, 746.

**3.** The plaintiff-in-error invokes only two precedents which it claims supports its contention, namely, *United States vs. McKee, 4 Dill., 128,* and *United States vs. One Distillery, 43 Fed., 846.* An analysis of these cases will show that there is only a single dictum in the Distillery Case which bears upon the question at all and as an expression of the Judge who wrote the opinion we submit that it is without foundation of law. This court expressly declined to pass upon the merits of that question when it came before it on appeal.

*United States vs. One Distillery, 174 U. S., 149, 152.*

The views of the Judge in the *One Distillery Case* have since been disapproved by two later decisions.

*United States vs. 3 Copper Stills,* 47 Fed., 495.

*United States vs. Olsen,* 57 Fed., 579, 585.

## POINT FIVE.

**The whole argument of the plaintiff-in-error is based upon doctrines which have been entirely outgrown by the development of the modern corporation and have long been obsolete.**

**1.** The fundamental doctrine which underlies the entire position of the plaintiff-in-error in making the contentions which we have just answered, is the old doctrine of *ultra vires* which from the earliest days has been put forth by the defenders of corporations to avoid liability for wrongs committed. Step by step they have been driven back from this position and the liability of the corporation for wrongs first civilly and

then criminally has been gradually established, until now it is universally recognized.

The doctrine of such corporate defenders was aptly characterized in a criminal case by the Supreme Court of New Jersey over fifty years ago.

> "It is further objected that a corporation aggregate cannot be liable to indictment for any crime, because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in The Chestnut Hill Turnpike Co. v. Rutter, 6 Binney, 12: 'According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice.'"
>
> *The State vs. The Morris and Essex Railroad Co.*, 23 N. J. L. Rep., 360, 369.

The argument thus denounced by the court half a century ago is precisely the same which this plaintiff-in-error raised by its 27th request to charge and for a refusal to charge which it now assigns error.

> "That in order to find that the defendant Pomeroy or Guilford was acting within the scope of his employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent had authority to establish lawful rates, but must find also that such agent had authority to

make the unlawful rates alleged in the indictment" (See Brief Plaintiff-in-Error, p. 31, Record, p. 81.

The argument was given scant courtesy by this Court in the Hollister case where Justice MILLER said:

> "It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors."
>
> *Salt Lake City vs. Hollister*, 118 U. S., 256, 259.
>
> See also *Goodspeed vs. The East Haddon Bank*, 22 Conn., 530, 536.
>
> *Philadelphia, etc., R. R. Co. vs. Quigley*, 21 Howard, 202.

**2.** The logical result of such a contention is as above pointed out that the corporation escapes all liability; that the only persons who can be punished are the agents themselves. Our opponents are reduced to admit this in their brief by contending that such liability of the individual agent is sufficient for the purposes of justice and of prevention.

See Brief, Page 69.

This is again an old story and one which long ago was discussed by the courts many times and had its unsoundness pointed out.

> "We are told that this remedy is not required because the individuals who concur in voting the order or in executing the work may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter if they can be identified are commonly persons of the lowest

rank, wholly incompetent to make any reparation for the injury. *There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings*" (Lord DENMAN in *The Queen vs. Great North. of England Railway Company*, 9 Q. B., 315, 327 (1846)).

"It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance." (*Salt Lake City vs. Hollister*, 118 U. S., 256, 260.)

See, also, *Chestnut Hill & Spring House Turnpike Co. vs. Rutter*, 3 S. & R. (Pa.), 6 (1818).

And in no conceivable case could the contention be more flagrant than a case of this kind arising under the Interstate Commerce Laws where the ineffectiveness of a punishment which reached only the agent has been demonstrated by a nation's experience.

"What has been the great difficulty in the way of administering the interstate commerce law? Where has the trouble originated? Mind you, that in sixteen years, with all of the broad provisions making criminal the acts that we reprobate, no single successful prosecution has been waged against a malefactor; not one. There has been no conviction. Why? Simply because the Interstate Commerce Commission could not make the proofs. The knowledge that was essential to conviction was locked in the minds of a comparatively

few people. The prosecutions were almost invariably against that class, and the community of kindly feeling, the close relations that existed prevented one member of that class from testifying against his fellows, and hence it has been that prosecutions have failed. *They refused to testify, because the punishment would fall upon the individual and might be for long periods of imprisonment.* Hence the witnesses would not and could not be made to testify. We are trying to remedy that difficulty."

Mr. Hepburn in debate in the House on the Elkins' Bill, 1903 (36 Cong. Rec., pages 2151–2159).

See also Report of Interstate Commerce Commission, Jan. 17, 1902, p. 6.

See also Report of Interstate Commerce Commission, 1892, p. 39.

**3.** And apart from these reasons of public policy, there is no injustice in punishing the corporation, but quite the reverse. As pointed out by the Interstate Commerce Commission, the offense is committed for its benefit.

See 6th Annual Rep. Interstate Commerce Commission, 1892, page 39.

See also 15th Annual Report Interstate Commerce Commission, page 7.

And in committing the crime the offending agent acts with all the momentum of the corporate fund and power behind him and is just by so much a greater menace to society. It is no new doctrine of law that under such circumstances the fictitious personality which thus participates in the offense shall be made punishable therefor, even if its owner be wholly innocent of such participation. Among the earliest cases of this court are decisions holding a vessel and other property forfeitable *in rem* for acts in which they participated, even though their owners were wholly innocent.

"Controversies of the kind have arisen in our judicial history; and it has always been held in

such cases that the acts of the master and crew bind the interest of the owner of the ship, whether he be innocent or guilty, and that in sending the ship to sea under their charge he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by means of their unlawful or wanton misconduct" (*Dobbins's Distillery vs. United States*, 96 U. S., 395–401).

Citing *United States vs. Brig Malek Adhel*, 2 How., 210.

## POINT SIX.

**None of the formal objections to the indictment are well taken.**

All of the contentions made under the defendant's fourth point as to the form of the indictment were raised on their demurrer and argued before Judge HOLT, and his opinion, as it seems to us, clearly and decisively disposes of them.

(Record, Fol. p. 30), 146 Fed. Rep., 298.

Similar indictments have been sustained by Judges HOUGH and HOLT in other cases.

*United States vs. Great Northern Railway Co.*, 157 Fed. Rep., 288.

*United States vs. Delaware, Lackawanna & Western*, 152 Fed., 269.

We submit these opinions confidently as sufficient answer on this point made by our opponant. It is only necessary perhaps to point out that their chief contention as to the necessity of averring that some advantage was given or discrimination practiced has, since the foregoing cases, been finally disposed of adversely to them by this court in the Armour case.

*Armour Packing Co. vs. United States*, 209 U. S., 84.

As indicative of the lack of seriousness of the contentions grouped in this point, we also call attention to the fact that one of these contentions is based upon the alleged failure of the indictment to use the word "willfully."

Brief, pages 93, 94, 95.

As a matter of fact the word "willfully" is used (though as we believe, under the Armour case, quite unnecessarily) in each of the counts of the indictment (fols. 13, 16, 19, 22, 25, 26).

## POINT SEVEN.

**Each of the counts of the indictment charges a separate offense and the sentence upon each count was proper and should be affirmed.**

1. This question as presented by the facts in this case is very simple. Unlike the Standard Oil case and the Armour case where the unlawful rate consisted in a "concession" made by the railroad company *in the first instance* and where the railroad company never received the lawful tariff rate, here, as the Court will remember, the full amount of the lawful tariff was originally paid by the shipper upon all of the shipments and the offense was not consummated until a specific sum of money as a rebate from that lawful tariff rate was repaid by the carrier. Therefore, the illegal acts of the offending carrier are much more clearly divisible than they might otherwise have been.

The Court will recall that each of the counts charges the payment of a separate rebate upon a separate day, each rebate affecting a separate series of shipments covering a period of one or two months. Further-

more, each of these payments was made upon a separate claim of the amount of the payment filed with the carrier by the shipper. The parties to the offense have thus sharply separated their transactions. Each payment by the Railroad Company was totally distinct from every other as a matter of fact and related to a wholly different series of shipments and thus to a wholly different commercial transaction.

**2.** Furthermore, each successive payment was an entirely voluntary act on the part of the carrier. It was under no legal obligation to make the payment. This has been made absolutely clear by the decisions of this Court. The unlawful agreement with the shipper, on April 26th, 1904, placed the carrier under no obligation to carry out that agreement on August 31st, 1904, when the first rebate was paid. Even if the carrier had given a bill of lading for the goods at the unlawful rate, it would have been its duty, and it would have been legally free to refuse to accept any lower sum than that named in the lawful tariff.

*Texas & Pacific Railway Co. vs. Mugg*, 202 U. S., 242.
*Railroad Co. vs. Hefley*, 158 U. S., 98.

On August 30th, 1904, the situation was, therefore, that the Railroad Company had carried the shipments of April and May at the lawful tariff rates; it had not yet committed the offense charged in reference to those shipments and it was under no obligation to do so. It was not until the following day when it paid the rebate that the offense was consummated and it became criminally liable. There was then on that day, beyond any doubt, the completion and consummation of a crime under the Elkins Law.

Correspondingly, when the next date of payment (September 14th) arrived, the Railroad Company was perfectly free, so far as legal obligation was concerned, to pay or not pay the rebates agreed upon as to the

shipments of June. It had had a *locus penitentiae* since the last crime. It was quite free and it was its duty even at that time, to repudiate the unlawful arrangement and decline to further carry it out. When, therefore, on September 14th, it actually paid the rebate, can it be doubted that this constituted a new and complete offense under the Act? And the same thing is of course true as to the remaining payments covered by the indictment. As was stated by Judge HOUGH in a similar case against another carrier under a similar indictment in the same district:

> "But it is an equally great abuse of the statute to argue that all the overt acts flowing from the originally criminal agreement must necessarily be (so to speak) merged in the agreement. This is a method of capitalizing offenses to be as much discouraged as the undue subdivision thereof. If, however, the payment and acceptance of the rebate be the substantial offense here charged, then I think each substantial payment is properly the subject of separate indictment or count, just as truly as each separate and distinct visit of a burglar to a chest he slowly rifles of a set of silverware constitutes a separate offense, although it was his original intention to take the entire set sooner or or later."
>
> *United States vs. Great Northern Ry. Co.*, 157 Fed. Rep., 288, 291.

In the case of *In Re Henry*, 123 U. S., 372, a similar but less clearly untenable contention was made on behalf of the offender with reference to the provisions of Section 5480, punishing schemes to defraud by means of the Post Office establishment. This Court said:

> "As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but

the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the Act.' It is not, as in the case of *In Re Snow*, 120 U. S., 274, a continuous offense, but it consists of a single isolated act and is repeated as often as the act is repeated" (Affd. *In re De Bara*, 179 U. S., 316).

**3.** Again, if this contention were well founded and all of the transactions set forth in the indictment constituted but a single offense, a conviction under the original agreement or a conviction for the giving of a rebate on August 31st, 1904, could be pleaded in bar to prosecutions for the giving of the later rebates in September, October and November, 1904. That such a result would be preposterous hardly needs argument. A similar situation was presented in *Bliss vs. United States*, 105 Fed. Rep., 508, where a defendant upon trial for aiding in counterfeiting urged that a prior conviction for counterfeiting similar notes from the same plates of the same series but at a different time, was a bar and that the entire matter was a continuous offense and could not be severed. The Circuit Court of Appeals dismissed the contention with the statement that

> "The law is clear that, on the state of facts which this record shows, the counterfeiting of notes at different times, although all apparently of the same series and printed from the same plate, constitutes distinct offenses."

**4.** The law does not penalize merely an agreement or offer to give rebates. It penalizes the *payment*, and therefore necessarily each payment. It was the intention of the law to stop the offense of rebating by making the penalties more effective than the experience of the previous sixteen years had demonstrated

the penalties under the old law to be. If our opponents' contention were well founded, Congress in 1903, instead of making the law more effective, succeeded only in establishing what would amount to a license system for the perpetual giving of rebates under an initial agreement. The records in the two cases now before this Court, Nos. 57 and 69, show that carriers and shippers might well afford to pay $20,000 for the privilege of being allowed to rebate indefinitely thereafter.

## POINT EIGHT.

1. Plaintiff-in-error urges that a portion of the charge in regard to Embleton and his books, constitutes reversible error. The Court will remember that the facts brought out in the trial were these :

The book in question was a special book recording illegal claims against the Railroad Company, and was kept by Embleton in a manner and under a system which was different from the manner and the system in which the regular and legitimate claims against the Railroad Company were recorded. In March, 1906, Embleton's chief was called before the grand jury shortly before the finding of the indictment in this case, No. 57, and during the very month in which the indictment in the other case, No. 69, was found. During that very month Embleton went away to Texas, on leave of absence on the score of sickness, according to the testimony of Wilson, an interested witness (fol. 75). At the same time this book, the property of the defendant corporation, containing entries of these illegal claims disappeared (See Statement of Facts, p. 14 ).

All of these facts were before the jury admitted without any objection or exception on the part of the

defendant. The Court submitted the case to the jury upon instructions as to the necessity of criminal intent which were far more favorable to the defendant than would have been necessary under the recent decision of this court in the *Armour case*. He submitted these undisputed facts to the jury in connection with this question of intent leaving it wholly to the jury whether or not they would draw any inferences from such undisputed facts already before them. His course in so doing was perfectly proper.

See *Clifton. vs. United States*, 4 How., 242.
*United States vs. Flemming*, 18 Fed. Rep., 907.
*1 Wigmore on Evidence*, Secs. 285–291.

The Judge also expressly charged the jury in respect to the evidence which he quoted :

> " Now, gentlemen, if my quoting of this evidence does not consort with your recollection of it, you are to be guided by your own recollection of it. I will endeavor to state it correctly. If I state it wrongly in any respects you will correct me " (fol. 98).

Furthermore, in a later portion of his charge made in response to the defendant's request he charged

> " that there is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the Government was asked " (fol. 109, p. 83).

If, by any construction, any injustice could have been done to the defendant by the first portion of the charge, this last request certainly cured it.

**2.** At page 45 of their brief, counsel for the plaintiff-in-error, without making it a specific point, assert that the court's refusal to charge request No. 20 is an error

which "is enough to require the reversal of the judgment." They make this assertion in connection with an alleged statement of the court below as to "ratification by the Company of the acts of its agents" (Record, pp. 43–44).

It should be noted that this statement of the Court did not take place in the presence of the jury, but was made upon the decision of a preliminary motion to quash. Later, when he declined to charge request No. 20, he was amply justified in his refusal by the fact that there was no evidence whatever before the jury as to ratification by the corporation. The Court was not called upon to charge an academic proposition of law.

3. We do not think that it is necessary to take up any of the other points mentioned in the brief.

## CONCLUSION.

**It is therefore respectfully submitted that the judgment of the Circuit Court should be affirmed.**

CHARLES J. BONAPARTE,
Attorney-General.
WADE H. ELLIS,
Assistant to the Attorney-General.
HENRY L. STIMSON,
United States Attorney.